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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1061

JAMES E. CURRY,

Petitioner,

v.

ROBERT E. SHER AND ABRAHAM J. HARRIS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James E. Curry
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Washington, D.C. 20010
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Pro Se

Washington, D.C. [illegible]

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IN THE

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

I, the undersigned petitioner, James E. Curry, attorney at law, *pro se* hereby petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit dismissing "for lack of an appealable order" my appeal from an order of the United States District Court for the District of Columbia denying my motion to vacate a prejudgment writ of attachment. Said writ had been issued and levied without notice to me

and, as I alleged, was utterly void and issued without jurisdiction because not supported by the affidavit required by the law of the District of Columbia.[1]

(a) Opinions Delivered in the Courts Below

No opinions were delivered in the courts below.

(b) Grounds of Jurisdiction

(i) A copy of the Order of the District Court of October 16, 1969 is attached as Appendix A. The date of the judgment or decree of the Court of Appeals sought to be reviewed is June 24, 1970. A copy thereof is attached as Appendix B.

The order appealed from contains an additional paragraph in which the court purports to deny a previous motion of mine for extension of time to file my brief as appellant. This part of the order is not to be considered by this Honorable Court, nor should it be deemed a justification for refusing to review the part that dismisses my appeal "for lack of an appealable order." The extra paragraph is nugatory (except as it may reflect judicial failure carefully to examine the case papers) because on February 25, 1969 the court had granted my motion for extension of time for filing my brief until 30 days "following the court's ruling on appellees' motion to dismiss the appeal, in the event said motion is denied."

(ii) A timely motion for rehearing was filed in the Court of Appeals. It was denied by order of September 8, 1970. A copy of said order is attached as Appendix C.

(iii) The statutory provision believed to confer jurisdiction on this court is Title 28 United States Code §1254(1). No extension of time for filing this petition has been requested.

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[1] District of Columbia Code Title 16 §501.

(c) Question Presented for Review[2]

The question presented for review is whether an order of the District Court for the District of Columbia is appealable to the Court of Appeals under Title 28 §1291 of the U.S. Code, said District Court order having denied a motion to vacate or dissolve a prejudgment writ of attachment which had been issued without notice to the undersigned defendant and levied against certain funds and which, as this defendant alleged, was utterly void and without jurisdiction because it was not supported by the affidavit required by District law.

(d) Constitutional and Statutory Provisions

The constitutional and statutory provisions which the case involves are:

a. The Fifth Amendment of the Federal Constitution which declares that no person shall "be deprived of life, liberty or property without due process of law." This amendment can be found at page XLVI of Volume 1 of the official edition of the United States Code.

b. Title 28 §1291 of the United States Code, copy of which is attached hereto as Appendix D. Said provision can be found at Volume 7 page 5959 of the official edition of the United States Code.

(e) Statement of the Case

In this case Mr. Sher (and his partner Mr. Harris) sued me for attorneys' fees. The case is still pending for trial on the merits in the District Court. When filing his complaint, Sher also filed a separate ancillary proceeding for attach-

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[2]Note that the question presented for review does not include the matter of the validity of the attachment. This will be decided by the Court of Appeals if this Honorable Court sees fit to reverse that Court's order dismissing my appeal.

ment which was levied without notice to me upon certain Indian trust funds in which I had a contingent interest and which were held by Attorney I.S. Weissbrodt in trust under orders of the Indian Claims Commission[3] and an order of the District Court[4] in the case of *Cohen v. Curry*. Sher did not support his attachment writ with the affidavit required by the law of the District.[5] I moved for dissolution or vacation of the writ on the ground that it was utterly void and issued without jurisdiction. The District Court denied my motion. I appealed. Sher moved to dismiss my appeal for lack of an appealable order under Title 28 § 1291 of the United States Code. Before my brief on appeal was due to be filed, the Court granted Sher's motion.[6] I filed a motion for rehearing which was denied.[7] No opinion was issued on either order although Mr. Sher had filed numerous pleadings and memoranda in support of his motion and I had filed many in opposition. The order of the court shows by clear implication that much of this material was disregarded by the Court. I now seek certiorari to review the order dismissing my appeal so that the Court of Appeals will be required to give consideration to it.

* * * * *

The above is a bare-bones statement of the case itself. Points I, II, and III of my argument will show why it is sufficiently important to justify intervention by this Honorable Court. But its most profound importance stems from its integral relationship with the case of *Cohen v. Curry*[8] which

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[3]E.g. *Northern Paiute Nation v. U.S., 20 Indian Claims Commission*, 414-432, especially first full paragraph on page 418.

[4]R-20, February 11, 1969, *Cohen v. Curry*, No. 24340 in the United States Court of Appeals for the District of Columbia Circuit.

[5]See footnote 1 above.

[6]Order of U.S. Court of Appeals, D.C. in *Sher v. Curry*, No. 23,780, June 24, 1970.

[7]Order of U.S. Court of Appeals, D.C. in *Sher v. Curry*, No. 23,780, September 8, 1970.

[8]No. 24,140, U.S. Court of Appeals, D.C.

is also pending in the Court of Appeals. It would be easier for this Honorable Court to disregard this connection but if so it would be shutting its eyes to extremely important facts on the record.

The *Cohen* case is based on a bitter squabble between me and several other lawyers, including incumbent Congressman Jonathan B. Bingham of New York and Felix S. Cohen, former top Indian-affairs lawyer in the Department of the Interior as to which of us shall share in certain Indian tribal recoveries in claims cases filed by me during the Forties and Fifties. The Cohen case involves not only the sacred obligations of Uncle Sam to his Indian wards but also the high duty of the government to protect all the people from corruption on the part of such public officials.

Sher purported to be my personal attorney in the Cohen case. I discovered that he had appropriated some of the money in dispute and was holding it in his own name, purportedly as an "escrow agent" for the opposite parties. For this gross infidelity to duty I fired him and he returned the misappropriated funds. But he then sued me for $10,000 in fees and attached part of the same Indian trust funds that were in dispute in the case. He thereby made himself in effect a party to the sordid lawyers' wrangle over Indian money that is involved in the *Cohen* case. His attachment thereby assumes all the elements of public importance that exist in the *Cohen* case.

The *Cohen* case, like the *Sher* case was a suit for attorneys' fees. It was filed against me to enforce the alleged rights of Congressman Bingham, Associate Solicitor Cohen, and a cousin of Felix Cohen named Henry Cohen. Bingham alleged that he "remembered" doing 100-200 hours of work on certain of the claims back in 1947. He had never submitted his fee claim to the Claims Commission. He did not assert that the work was ever reported to me as attorney of record in the cases until the suit was filed more than twenty years later. The suit was filed in January, 1969, not by Bingham but by Ceil Bryson Cohen who claims to be the

widow of Henry Cohen and the "assignee" of Felix Cohen and of Bingham.

By the time the *Cohen* suit was filed, I had transferred my duties as attorney of record in the claims cases to I.S. Weissbrodt. After the suit was filed, the Claims Commission made an award in one of the cases and an award of attorneys' fees in the amount of a million and a half dollars.[9] Meanwhile, the District Court had entered an order requiring that portions of said fees be held in trust pending the outcome of the *Cohen* case[9a] which order was duly noted in the Claims Commission order. In its order, the Claims Commission provided for payment of the fees to Weissbrodt for distribution to various lawyers, including myself, subject to the order of the District Court.

While these Indian moneys were in the hands of Weissbrodt for a few days, before his compliance with the order of the District Court, Sher executed his attachment writ against them. The intervening transfers in trust were all executed by or under orders of federal agencies, i.e. the Treasury, the Claims Commission, the District Court, etc. These were all acts attributable to the original trustee, i.e., the federal government. Therefore the funds remained impressed with the original trust in favor of the Indians. The funds have never come into my hands. As will be shown below in this Statement, the interest of the Indians in the outcome of the Curry-Cohen-Bingham-Sher-Weissbrodt dispute is not merely theoretical but very real and substantial.

When the *Cohen* case was first called for trial, the lower court announced *on the record*[10] that "if conduct like this

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[9] *Northern Paiute Nation v. U.S. 20 Indian Claims Commission*, 414 to 432, especially page 432.

[9a] Order, February 11, 1969, R-20, *Cohen v. Curry*, United States Court of Appeals, D. C. No. 24,140.

[10] Transcript of Hearing, May 21, 1969, *Cohen v. Curry*, United States Court of Appeals, D.C. No. 24,140, R-35, Vol. A pages 1-8, at pages 2 and 4.

is publicized it reflects on the Bar in the eyes of the general public" and that the court "could not guarantee freedom from publicity in a public courtroom." The *Cohen* case has never been tried on its merits. Instead a "supplementary proceeding" was devised and conducted from which evidence as to the actual rights of Bingham and Cohen was carefully and strictly excluded. I represented myself in that proceeding.

Plaintiff contended (with the support of my defecting attorney, Sher) that I had made an alleged "oral" stipulation to pay $150,000 for the work alleged by Bingham, i.e. at the rate of $1,500 per hour. Another witness said I had agreed "by a nod of the head." I repudiated and denied the oral agreement. But the lower court judge made many prejudicial rulings, including one in which he specifically instructed the jury (contrary to the fact) that I myself "contended" that the agreement had been made for me by Sher. So the verdict and judgment went against me.

In my appeal from the Cohen judgment,[11] I contend that the $1,500-per-hour award for Bingham's services is unconscionable and that the lower court refused to permit this issue to be tried; that the court excluded evidence tending to show perjury by Bingham's assignee; and that the judge falsely informed the jury as to my own contentions. I also contend[12] that the award violates numerous federal laws[13] intended to protect the Indians from claims brokerage, exorbitant fees and other abuses by Indian tribal attorneys and their cronies among the Congressional and executive officials who control and oversee the administration of Uncle Sam's Indian trust obligations. I also invoke the federal conflict-of-interest laws,[14] the federal anti-assignment

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[11] Brief of Appellant, November 12, 1970, *Cohen v. Curry*, No. 24,140, U.S. Court of Appeals, D.C.

[12] *Id.*, pages 23-53.

[13] United States Code, Title 18 §§ 2, 438; Title 25 §§ 70-70w, 81-85; 48 Stat. 984; 49 Stat. 388; Code of Federal Regulations, Title 26 §§ 71, 72.

[14] United States Code, Title 18, §§ 205, 207.

law,[15] the applicable statute of frauds[16] and the rules of the District Court which forbid enforcement of oral stipulations.[17]

The interest of the Indians (whom the lower court refused to let me implead) arises from the illegalities above mentioned. I contend that if the arrangements on which the judgment in *Cohen* was based were corrupt and illegal, the fruits thereof should not go to those who participated in the corruption, namely Bingham, the three Cohens and Sher. And if I am found myself to have participated in them, neither should the moneys be paid to me. Instead of paying the money to the culprits, it should be retained by the government in trust for the Indians who were the original victims of such corrupt and unethical practices.

I will show in my argument on Point IV below why the circumstances above stated lend this case sufficient importance to justify the requested writ of certiorari. In other arguments I will show why, even regardless of said circumstances, the Sher case alone and of itself is of importance sufficient to justify the requested writ.

Pursuant to Rule 23(g) of his Honorable Court, I state that the basis for federal jurisdiction of the court of first instance (i.e. the District Court of the District of Columbia) is to be found in Title 11 Ch. 5 of the District of Columbia Code at page 606 in Volume 1.

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[15] United States Code, Title 31, § 203, District Court, D.C. Rule 3.

[16] District of Columbia Code, 1967 Ed., Title 28, § 3503.

[17] Local Rules, U.S. District Court, D.C., Rule 3.

ARGUMENT

POINT I

THE COURT OF APPEALS DECIDED THE QUESTION PRESENTED HEREIN FOR REVIEW IN A WAY THAT CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS ON THE SAME MATTER AND IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THE U.S. SUPREME COURT.

The question presented for review (as to whether orders confirming void prejudgment attachments and garnishments, etc., are appealable under jurisdictional acts like that of the Court of Appeals[18]) is an abstruse one that has confused many lawyers and judges. It was never clear that *defendants* could appeal such orders until the decision in the *Baxter* case in the 8th Circuit.[19] This case was decided on February 3, 1969. The *per curiam* opinion of Judges Lay, Gibson, and Harper contains an excellent analysis of previous Supreme Court decisions relating to the same topic.[20]

In the *Baxter* case a petition for certiorari was filed in this Court which was denied on May 5, 1969.[21] On June 9, 1969, this Court entered its decision in the *Sniadach* case.[22] Both the *Baxter* case and the *Sniadach* case were in all relevant respects similar to the one here under consideration. While the opinion in *Sniadach* did not mention the question of appealability the case was heard by this Court

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[18]United States Code, Title 28, § 1291.

[19]*Baxter v. United Forest Products*, 406 F.2d 1120.

[20]*Id.*, page 1123, third full paragraph to p. 1124; also p. 1125, first and second full paragraphs; also page 1126, last paragraph, to page 1127.

[21]*United Forest Products v. Baxter*, 394 U.S. 1018, Term No. 1251, 23 L.Ed. 2d 42, 89 S. Ct. 1635.

[22]*Sniadach v. Family Finance Corporation*, 305 U.S. 237, 23 L. Ed. 2d 349, 89 S. Ct. 1820.

under its jurisdictional act[23] which limits it to the consideration of "final" decisions, the same limitation that is imposed by the jurisdictional act of the Court of Appeals.

The *Baxter* case was ignored by my opponent in his motion to dismiss my appeal.[24] Its applicability was argued by me at length in my Response[25] and the *Sniadach* case was cited in an addendum thereto.[26] On February 26, 1970, the Court of Appeals for the Second Circuit issued a decision in the *West* case[27] in which it asserted that such orders as are here involved are not appealable. My opponent then filed a supplemental memorandum[28] in support of his motion to dismiss in which he continued to ignore the *Baxter* decision but quoted at length from *West*.

I filed a response[29] to his supplemental memorandum. This showed, with copies of the original record in *West*, that Judge Friendly did not even have before him the kind of order that is involved in the present case but an entirely different one as to which only local statutory considerations were relevant. My response also analyzed Judge Friendly's decision at great length and showed how extensively it conflicts with applicable prior decisions in the Supreme Court and elsewhere. There is further analysis of these decisions, especially *Sniadach*, in my petition for rehearing.[30] I understand that it is unsuitable to repeat such arguments here, but even a cursory examination of the *Sniadach* and *Baxter*

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[23] United States Code, Title 28, § 1257.

[24] *Sher v. Curry*, U.S. Court of Appeals, D.C. No. 23,780, February 2, 1970.

[25] *Id.*, February 12, 1970.

[26] *Id.*, March 4, 1970.

[27] *West v. Zurhorst*, 235 F.2d 919.

[28] *Sher v. Curry*, U.S. Court of Appeals, D.C. No. 23,780, April 6, 1970.

[29] *Id.*, May 13, 1970.

[30] *Id.*, July 8, 1970.

cases will reveal that they conflict with the order of the Court of Appeals in the present case.

POINT II

THE DECISION OF THE COURT OF APPEALS WOULD DEPRIVE DEFENDANTS IN ATTACHMENT AND GARNISHMENT CASES OF THE CONSTITUTIONAL PROTECTION GIVEN THEM BY THE SUPREME COURT.

With special reference to wage garnishments, this Honorable Court held in *Sniadach*[31] that "it needs no extended argument to conclude that absent notice and prior hearing, this prejudgment garnishment procedure violates the fundamental principles of due process." There was much discussion in Mr. Justice Douglas' opinion about the "inhuman" results of said garnishments as they affect wage earners. But there is nothing in the decision to indicate that the ruling applies any less to earners of legal fees. If such a distinction should be made, then an additional reason exists for requiring review by the Court of Appeals of the decision of the District Court in the present case.

If the Appeals Court's refusal to review is permitted to stand, it will deprive wage-earners in the District of Columbia of the benefit of the principles set forth in the *Sniadach* decision. District Court judges may well be expected not to take *Sniadach* very seriously if they know that their prejudgment garnishments cannot be attacked unless and until the defendant goes through the long process of trial and judgment of the main claim against him.

Furthermore, at least as in my case, it is doubtful if appeal of such decisions would *ever* be available. If I should lose in the main case and a judgment should be entered against me, I could ask for review of the attachment writ in connection with my appeal from the final judgment. But if I

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[31] See footnote 22 above.

should win that trial, which I hope to do, I will have no adverse order to appeal from except the attachment writ; and the time for appealing that order will have expired. Like the defendant in *Sniadach*, I would again be deprived of due process of law.

POINT III

BY DISMISSING MY APPEAL AND DENYING MY PETITION FOR REHEARING, WITHOUT ANY OPINION THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The impropriety of the failure of the Court of Appeals to issue an opinion in this case is emphasized by the arbitrary actions of the lower court in the related *Cohen* case, as outlined in the above Statement of the Case. The lower court in the present case also threatened me with citation for contempt of court when I attempted to argue the invalidity of the attachment.[32] This sort of attitude bodes very ill for the treatment I may expect in future proceedings in both cases.

This Honorable Court has said[33] that "we have repeatedly emphasized the importance of a statement of the grounds of decision, both as to facts *and law*, as an aid to litigants and to this court" (underlining added). In that case, the Court vacated the order and remanded it to the court below "for findings and conclusions appropriate to a decision . . . ."

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[32] See Response, page 8, February 12, 1970 in *Sher v. Curry*, U.S. Court of Appeals, D.C. No. 23,780.

[33] *Public Service Commission of Wisconsin, et al. v. Wisconsin Telephone Co.*, 289 U.S. 67, 53 S. Ct. 514, 77 L. Ed. 1036.

The proper "course of judicial proceedings" is also described in the Canons of Judicial Ethics of the American Bar Association which provide[34] that:

> In disposing of controverted cases, the judge shall indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids suspicion of arbitrary conclusions, promotes confidence in his intellectual integrity and may contribute useful precedents to the growth of the law.

As set forth in my motion for rehearing[35] the text of Judge Fahy's order dismissing my appeal clearly itself implies that he failed to examine several of the memoranda filed by me and the important arguments that they contain.

I have had only one previous case before His Honor, one[36] which concerned the constitutional rights of a group of people holding unpopular religious views. That appeal was also dismissed without opinion. My clients lacked the funds to file a petition for certiorari. I don't know whether His Honor follows this practice habitually but at least in my limited experience he follows it consistently.

Such irregular practices bespeak a tendency to arrogate to the Circuit Court of Appeals, or at least to its Senior Judge, some of the prerogatives of the Supreme Court of the United States. Certainly it is true, as stated in the rules[37] that "a review on writ of certiorari is not a matter of right." But this is because of the special circumstances of the Supreme Court which do not exist in the Courts of Appeals.

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[34]Canon 19, Canons of Judicial Ethics, American Bar Association, adopted July 9, 1924.

[35]*Sher v. Curry*, U.S. Court of Appeals, D.C. No. 23,780, July 8, 1970.

[36]*Stevens v. Summerfield, Postmaster General*, May 22, 1958, 257 F.2d 205, 10 U.S. App. D.C. 201.

[37]Rule 19, Rules of the United States Supreme Court Effective July 1, 1970.

In cases where the issues are entirely clear, of course, or in cases where the issues have recently been decided, opinionless decisions may be justified. But otherwise such decisions, as the Bar Association says, create "suspicions of arbitrary conclusions" and destroy "confidence in the intellectual integrity" of the court. To this extent they may well constitute a substantial denial of review, which denial is not within the discretion of the Court of Appeals.

POINT IV

THIS CASE INDIRECTLY INVOLVES IMPORTANT CONSIDERATIONS OF LAW AND PUBLIC POLICY INHERENT IN FEDERAL GUARDIANSHIP OVER INDIANS AND IN THE PREVENTION OF GRAFT AND CORRUPTION IN CONNECTION THEREWITH.

Because of the circumstances set forth in the Statement of the Case, the American Indians and the federal government have a deep interest in the outcome of the Curry-Cohen-Bingham-Sher-Weissbrodt dispute of which the present case is one phase. The relation of the federal government to the Indians is well described by Felix S. Cohen in his standard work on the subject.[38] He quotes from the *Kagama* case[39] wherein this Honorable Court so early stated:

> These Indian tribes *are* the wards of the nation. They are communities dependent on the United States . . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this court, whenever the question arises.

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[38] Cohen, *Handbook of Indian Law*, U.S. Department of the Interior, Office of the Solicitor, 1945, pages 169-73, especially page 170.

[39] *United States v. Kagama*, 118 U.S. 375 (1888), 30 L. Ed. 228.

Surely nothing involves higher considerations of public policy than the faithful exercise by the government of its sacred duty to its wards, especially when it is coupled with the duty to the entire nation to prevent corruption in government. The Supreme Court of the United States shares these obligations with the other branches of government.

CONCLUSION

This Court should grant certiorari, the order dismissing the appeal should be reversed, and the Court of Appeals should be required to hear my appeal on its merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT E. SHER, et al.,

Plaintiffs,

v. Civil Action No. 1589-69

JAMES E. CURRY,

Defendant.

O R D E R

This cause came on for hearing on October 9, 1969, on defendant's motion to dissolve attachment and for extension of time and on plaintiffs' motion for default judgment, and the Court having heard the argument of counsel and being fully advised, it is

ORDERED that the said motion of defendant and the said motion of plaintiffs be and they are hereby denied, and it is

FURTHER ORDERED that the defendant shall have ten days from this date to serve and file his answer to the complaint.

Dated this 16 day of October 1969.

/s/ John J. Sirica
Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,780

SEPTEMBER TERM, 1969

Robert F. Sher and
Abraham J. Harris

Civil 1589-69

v.

James F. Curry,
Appellant

Before: Fahy, Senior Circuit Judge; Tamm and Robinson, Circuit Judges; in Chambers.

O R D E R

On consideration of appellees' motion to dismiss this appeal for want of jurisdiction, of the responsive pleadings filed with respect thereto and on consideration to appellant's motion for an extension of time within which to file appellant's brief, it is

ORDERED by the Court that appellees' aforesaid motion to dismiss be granted and this appeal is hereby dismissed for lack of an appealable order and, it is

FURTHER ORDERED by the Court that appellant's motion for extension of time within which to file appellant's breif is denied.

Per Curiam

Circuit Judge Robinson did not participate in the foregoing order.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,780 SEPTEMBER TERM, 1969

Robert E. Sher and
Abraham J. Harris

Civil 1589-69

v.

SEP 8 1970

James E. Curry,
Appellant

Before: Fahy, Senior Circuit Judge; Tamm and Robinson, Circuit Judges, in Chambers.

ORDER

On consideration of appellant's *pro se* petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid *pro se* petition is denied.

Per Curiam

For the Court
NATHAN J. PAULSON
Clerk

APPENDIX D

§ 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1061

JAMES E. CURRY, *Petitioner*

v.

ROBERT E. SHER, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

There were no opinions delivered in the courts below.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Act of June 25, 1948, c.646, 62 Stat. 929, as amended, 28 U.S.C. 1291, provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

The pertinent portions of the Act of Dec. 23, 1963, 77 Stat. 478, as amended, D.C. Code §§ 16-501, 16-505, 16-506 and 16-510, are set forth in Appendix A hereto, *infra*, pp. 8-10.

QUESTION PRESENTED

Whether a district court order denying a motion to dismiss or dissolve an attachment is an appealable order.

STATEMENT OF THE CASE

Respondents brought this action in the United States District Court for the District of Columbia (D.C. Code, § 11-521) to recover attorneys fees for legal services rendered to petitioner, in the amount of $10,053.50. Simultaneously, respondents, in accordance with the provisions of D.C. Code, § 16-501, obtained a writ of attachment before judgment in the amount of respondents' claim. To obtain such writ, respondents filed the affidavit required by the D.C. Code, and also filed the required surety bond in twice the amount of their claim. The writ of attachment was duly served on a garnishee who responded that there were in his possession or charge credits of petitioner in the amount of $138,890.

After petitioner was served with summons and complaint, he moved to dissolve the attachment on the ground that respondents' affidavit did not comply with D.C. Code, § 16-501. The district court denied petitioner's motion.

From that order, petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. Respondents' motion to dismiss the appeal for want of jurisdiction came before Judges Fahy,

Tamm, and Robinson and the court (Judge Robinson not participating) dismissed the appeal "for lack of an appealable order." Thereafter the court (Judges Fahy, Tamm, and Robinson) denied petitioner's petition for rehearing. Petitioner also requested rehearing *en banc,* but no judge requested a vote thereon. F.R. App.P., Rule 35(b).

ARGUMENT

1. The case does not warrant review. The decision of the court below dismissing the appeal was eminently correct, and there is no conflict of decisions.

When petitioner's motion to dissolve the attachment was denied by the district court, petitioner was free, if he wanted to pursue his attack on the attachment, to file affidavits traversing the respondents' affidavit, as provided in D.C. Code, § 16-506, *infra,* p. 10. The issue as to "whether there was just ground for issuing the attachment" would then have been tried,[1] and if the proofs had not sustained respondents' affidavit, the court would have quashed the writ of attachment.

Petitioner did not see fit, however, to try the issue of the validity of the attachment. Instead, he stood on his motion to dissolve the writ and appealed from the district court's denial of that motion. Petitioner thus put himself in the position of a defendant who, after denial of his motion to dismiss a complaint, stands on it and appeals from the order of denial. It is well sett'ed that such a denial, without more (cf. 28 U.S.C. 1292 (b)), is not appealable. *Catlin* v. *United*

[1] D.C. Code, § 16-506 provides that such trial may be held on three days' notice by "a judge at chambers," by the court alone, or by a jury, and that the trial may be "as well upon oral testimony as upon affidavits."

States, 324 U.S. 229, 236; *United States* v. *Florian*, 312 U.S. 656; *Newport* v. *Revyuk*, 283 F.2d 145 (C.A. 8); *Smith* v. *Benedict*, 279 F.2d 211 (C.A. 7); *Spruill* v. *Cage*, 262 F.2d 355 (C.A. 6); *Ercona Camera Corporation* v. *Brownell*, 100 U.S. App. D.C. 394, 246 F.2d 675; *Connell* v. *Dulien Steel Products*, 240 F.2d 414, 417 (C.A. 5); *Division 689, Etc.* v. *Capital Transit Company*, 97 U.S. App. D.C. 4, 227 F.2d 19; *John Hancock Mut. Life Ins. Co.* v. *Kraft*, 200 F.2d 952 (C.A. 2).

As stated by this Court in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123-24:

> Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. [Citing cases] This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction.

"Good judicial administration" requires that a judgment of which review is sought "should be final * * * as to the whole subject-matter" (see *Collins* v. *Miller*, 252 U.S. 364, 370) rather than as to merely a liminal matter as here.

Measured by these standards, the order denying petitioner's motion to dissolve the writ was clearly no more appealable than an order denying a preliminary motion to dismiss a complaint. The whole subject matter of the attachment could not be disposed of until, at the

very least, petitioner would file the traversing affidavits contemplated by D.C. Code, § 16-506, and go to trial on the issue as to "whether there was just ground for issuing the attachment" (*ibid*). But this the petitioner refused to do. Until such time, however, "it is impossible to know whether the [petitioner] will be able to show any colorable claim of prejudicial error" (see *Andrews* v. *United States*, 373 U.S. 334, 340) by reason of the attachment.

Indeed there are authorities which indicate that even had petitioner gone to trial on his challenge to the attachment, an adverse decision would not have been appealable by him prior to a final determination of the principal claim to which the attachment proceeding was merely ancillary. *West* v. *Zurhorst*, 425 F.2d 919 (C.A. 2), citing *Swift & Co.* v. *Compania Colombiana*, 339 U.S. 684, 689; *American Mortgage Corp.* v. *First National Mortgage Co.*, 345 F.2d 527 (C.A. 7).[2]

---

[2] *Baxter* v. *United Forest Products Co.*, 406 F. 2d 1120 (C.A. 8), cert. denied, 394 U.S. 1018, cited by petitioner as contrary, is a far different type of case. There the district court simply ordered certain instalment payments due from plaintiff to defendants to be paid into the court's registry and withheld from the defendants. There was no question of compliance with the state attachment law, the district court taking the position that it was inapplicable. As stated by the court of appeals (406 F.2d at 1125), "The question which makes this matter reviewable is whether the law permits a trial court to circumvent the Iowa law of attachment altogether." On the contrary, in *West* and *American Mortgage*, *supra*, as in the instant case, the district courts fully recognized the applicability of the local attachment laws and held, as a matter of law, that plaintiffs were in compliance with them.

The citation by petitioner of *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, is also inapposite. (1) As petitioner himself recognizes, the question of appealability was not raised or considered in the case, and it is therefore not a holding on that question. *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 363,

But there is no need to go that far. For present purposes it suffices that, even viewing the attachment issue as independent of the principal claim, petitioner did not pursue his attack on the attachment to a final decision as to "whether there was just ground for issuing the attachment" (D.C. Code, § 15-506) as required by 28 U.S.C. 1291.

2. The petition is wholly without merit and futile. We suggest that indeed it is an exercise in frivolousness. Petitioner, who appears *pro se*, is nevertheless a member of the bar. As such he has undoubtedly known all along of his right under D.C. Code, § 16-506 to a speedy trial and determination of the question "whether there was just ground for issuing the attachment." But he spurned such a trial and determination, as he did the statutory means provided (D.C. Code, § 16-510) for securing the release of the attached property. Instead he has gone the appellate route, first to the court of appeals, and now to this Court. He has used his petition as a device to spread before this Court the same scurrilous, scandalous, defamatory, and impertinent statements about respondents [3]

---

and cases there cited. (2) Under the law of Wisconsin, where *Sniadach* arose, the defendant is "without any opportunity to be heard" until the trial of the main suit (395 U.S. at 339), as distinguished from the provisions of D.C. Code, § 16-506, which afford a defendant a speedy trial on the question of the attachment itself. (3) Freezing a wage-earner's wages without a hearing for an indefinite time, which "may as a practical matter drive a wage-earning family to the wall," 395 U.S. at 341-42, is a far cry from the instant case where the attachment was levied on credits of petitioner in the amount of $10,053 out of a total of $138,890 of such credits held by the garnishee.

[3] Witness the fact that 80 per cent of the "Statement of the Case" contained in the petition is devoted to matters which petitioner himself recognizes are not involved in this litigation, in

that he spread before the court of appeals and the district court. This is conduct which, we respectfully suggest, is unbecoming a member of the bar and may warrant disciplinary action against petitioner.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel

---

the course of which petitioner makes accusations against not only one of the respondents, but also a district judge and four other lawyers, two of whom are dead. To answer all these impertinent and defamatory statements, implications, and insinuations is not the function of this brief. However, one charge made by petitioner, that respondent Sher "misappropriated funds" is so blatantly false that it must be answered. The funds referred to had been turned over to respondent Sher to be held in escrow pending approval of a settlement betweeen the parties in the case of *Cohen* v. *Curry*, Civil Action No. 86-69, United States District Court for the District of Columbia. When it appeared that the parties to the litigation disagreed as to the settlement, Mr. Sher requested the court for instructions as to the disposition of the funds. In response to his request, Judge Alexander Holtzoff entered an order on June 23, 1969, authorizing Mr. Sher to return the funds and discharging and relieving him of all responsibility and liability with respect to all or any part of said funds. The funds were returned. A copy of Judge Holtzoff's order is appended hereto as Appendix B, *infra*, p. 11. This is what petitioner denominates the misappropriation of funds.

APPENDIX A

The pertinent provisions of the Act of December 23, 1963, 77 Stat. 478, as amended, D.C. Code § 16-501 *et seq.*, follow:

§ 16-501. *Attachment before judgment; affidavit and bond*

(a) This section applies to any civil action in the United States District Court of the District of Columbia or the District of Columbia Court of General Sessions, for the recovery of:

• • •

(2) a debt; or

(3) damages for the breach of a contract, express or implied.

(b) In an action specified by subsection (a) of this section, the plaintiff, his agent, or attorney, may file an affidavit as provided by subsections (c) and (d) of this section either at the commencement of the action or pending the action.

(c) The affidavit shall comply with the following requirements:

(1) show the grounds of plaintiffs' claim;

(2) set forth that plaintiff has a just right to recover what is claimed in his complaint;

• • •

(4) where the action is to recover a debt, state the amount thereof; and

(5) where the action is to recover damages for breach of a contract set out, specifically and in detail, the breach complained of and the actual damage resulting therefrom.

(d) The affidavit shall also state one of the following facts with respect to defendant:

• • •

(3) he has removed or is about to remove some or all of his property from the District, so as to defeat just demands against him;

(4) he has assigned, conveyed, disposed of, or secreted, or is about to assign, convey, dispose of, or secrete his property with intent to hinder, delay, or defraud his creditors;

• • •

(e) Before a writ of attachment and garnishment is issued, the plaintiff shall first file in the clerk's office a bond, executed by himself or his agent, with security to be approved by the clerk, in twice the amount of his claim, conditioned to make good to the defendant all costs and damages which he may sustain by reason of the wrongful suing out of the attachment;

• • •

(f) If the plaintiff files an affidavit and bond as provided by this section, the clerk shall issue a writ of attachment and garnishment, to be levied upon as much of the lands, tenements, goods, chattels, and credits of the defendant as may be necessary to satisfy the claim of the plaintiff. (Dec. 23, 1963, 77 Stat. 543, Pub.L. 88-241, § 1, eff. Jan. 1, 1964; Aug. 6, 1965, 79 Stat. 447, Pub.L. 89-113, § 1).

§ 16-505. *Sufficiency of plaintiff's bond*

The defendant or any other person interested in the proceedings who is not satisfied with the sufficiency of the surety or with the amount of the penalty named in the bond filed pursuant to section 16-501, may apply to the court for an order requiring the plaintiff to give an additional bond in such sum and with such security

as may be approved by the court. If the plaintiff fails to comply with any such order the court may order the attachment to be quashed and any property attached or its proceeds to be returned to the defendant or otherwise disposed of, as to the court may seem proper. (Dec. 23, 1963, 77 Stat. 545, Pub.L. 88-241, § 1, eff. Jan. 1, 1964.)

§ 16-506. *Traversing affidavits; quashing writ of attachment; trial of issues*

If the defendant files affidavits traversing the affidavits filed by the plaintiff the court shall determine whether the facts set forth in the plaintiff's affidavits as ground for issuing the attachment are true, and whether there was just ground for issuing the attachment. When, in the opinion of the court, the proofs do not sustain the affidavit of the plaintiff, his agent, or attorney, the court shall quash the writ of attachment. This issue may be tried by the court or a judge at chambers after three days' notice. The issue may be tried as well upon oral testimony as upon affidavits. If the court deems it expedient, a jury may be impaneled to try the issue. (Dec. 23, 1963, 77 Stat. 545, Pub.L. 88-241, § 1, eff. Jan. 1, 1964.)

§ 16-510. *Release of property or credits from attachment; sufficiency of undertaking*

* * *

(c) Either the defendant or the person in whose possession credits are attached may obtain a release of the credits from the attachment by filing an undertaking with security to be approved by the court. (Dec. 23, 1963, 77 Stat. 547, Pub.L. 88-241, § 1, eff. Jan. 1, 1964.)

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CEIL BRYSON COHEN, Ancillary Executrix of the Estate of Henry Cohen, *Plaintiff*,

v.

JAMES E. CURRY, *Defendant*.

Civil Action No. 86-69

Order

This cause coming on to be heard on the motion of Robert E. Sher, Esq., attorney of record for the defendant, for instructions as to the disposition of certain funds in his possession and control; and it appearing that on May 23, 1969, in an attempt to carry out a settlement of this action, $150,000 was paid to Mr. Sher by I. S. Weissbrodt, Esq. from funds held by him as escrow agent pursuant to Order of this Court of February 11, 1969; and it further appearing that on May 26, 1969, Mr. Sher invested said $150,000 in United States Treasury Bills due June 23, 1969, which Mr. Sher bought at a discount of $646.87; and it further appearing that the said settlement was subject to the approval of this Court; and this Court on June 20, 1969, having refused to approve said settlement; it is by the Court this 23rd day of June 1969

ORDERED that Robert E. Sher, Esq. be and he hereby is authorized to return to I. S. Weissbrodt, Esq., the aforesaid sum of $150,000, either by check or by turning over to Mr. Weissbrodt the aforesaid United States Treasury Bills;

FURTHER ORDERED that Robert E. Sher, Esq. be and he hereby is authorized to pay to I. S. Weissbrodt, Esq. the sum of $646.87;

FURTHER ORDERED that upon complying with the two previous paragraphs of this Order, Robert E. Sher, Esq. shall

be fully discharged and relieved of all responsibility and liability with respect to all or any part of said funds;

FURTHER ORDERED that I. S. Weissbrodt, Esq. shall receive and hold such funds in accordance with the aforesaid Order of this Court of February 11, 1969.

/s/ ALEXANDER HOLTZOFF
Judge

Seen:

SACHS, GREENEBAUM & FROHLICH
By s NEWTON FROHLICH
Attorneys for Plaintiff

s JAMES E. CURRY
James E. Curry
Defendant

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1061

JAMES E. CURRY,

Petitioner,

v.

ROBERT E. SHER AND ABRAHAM J. HARRIS

REPLY BRIEF

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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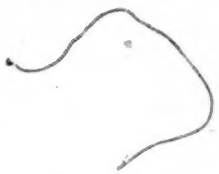

IN THE

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OCTOBER TERM, 1970

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JAMES E. CURRY,

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ROBERT E. SHER AND ABRAHAM J. HARRIS

REPLY BRIEF

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARGUMENT

General.

The most outstanding argument in Mr. Sher's December 31 Brief in Opposition is its last one. It "suggests" disciplinary action against me (*e.g.*, disbarment) for having written my Petition for Certiorari. If such an action is instituted, I expect to stand by my assertions. In such event, Mr. Sher's most strenuous arguments will be much more relevant than they are in this proceeding.

Mr. Sher also raises two new issues and for the first time makes several contentions. Under ¶ 4 of Rule 24, I am permitted to reply. But I must do so hurriedly (a) because under the Rules, the case may be decided without waiting for my reply and (b) because these lawyers keep me constantly and frenetically busy in another court.

I

WHETHER, AS HELD BY THE COURT OF APPEALS, THE DECISION OF THE DISTRICT COURT WAS NON-APPEALABLE

This issue was not argued and was not arguable in my petition. It should be argued to this Court if and when certiorari is granted. By arguing it in his opposition, Mr. Sher seeks to have it decided, as it was decided by the Court of Appeals, without giving me a proper opportunity to be heard.

He says[1] that "the decision of the court below dismissing the appeal was eminently correct." He says[2] that by electing to appeal instead of trying the issues raised by his irrelevant affidavit, I put myself "in the position of a defendant who, after denial of a motion to dismiss a complaint, stands on it and appeals." He cites at length. But they do not relate to the present issue.

This case does not involve a *complaint* which takes no man's property but a writ of attachment which does. Such writs are often called "judgments without trial."

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[1] Brief for Respondents in Opposition, page 3 lines 7 and 8.

[2] Same, page 3, last full paragraph.

The *Sniadach* decision held one unconstitutional because it "froze" a man's money without a chance to be heard. My money was "frozen" without a chance to be heard, without notice to me and even without compliance with the statute conferring jurisdiction for issuance of the writ.

II

WHETHER RESPONDENTS FILED ATTACHMENT AFFIDAVIT REQUIRED BY LAW.

Neither was this issue argued or arguable in my petition. I want to argue it, which is why I asked this Court to require that my appeal be heard. By arguing it here, Mr. Sher attempts to have another issue decided against me more-or-less *in absentia*.

He says[3] that he "filed the affidavit required by the D.C. Code. He quotes the provision of the Code.[4] It requires him to "state" under oath certain "facts" therein spelled out. It is true that Mr. Sher filed *an* affidavit. But it did not state the facts required by the law. Nor does he say in his Opposition that it did.

The attachment law is jurisdictional. It must be strictly construed. I have a hundred precedents holding that attachments like Sher's are null and void. I find none to the contrary and he has suggested none. I will argue this point when the time arrives. But if the writ is not granted, I may never have a chance to do so.

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[3] Same, page 2 line 18.

[4] Same, page 9, lines 1–9.

III

CONFLICT WITH DECISIONS OF THIS COURT.

Mr. Sher tries to distinguish the *Sniadach* decision.[5] He says:[6]

> Freezing a wage-earner's wages without hearing for an indefinite time which "may as a practical matter drive a wage-earning family to the wall" 395 U.S. at 341-2 is a far cry from the instant case where the attachment was levied on credits of the petitioner in the amount of $10,053 out of a total of $138,809 of said credit held by the garnishee.

He fails to mention that by other devices in the *Cohen* case, he has "frozen" and kept frozen under his personal control all the rest of about a half million dollars. This represents all sums due me for work over a quarter of a century. Retired and unemployed lawyers can be "driven to the wall," just as fast as wage-earning families by such harassments as I am now suffering.

In this case, as in *Sniadach*, the "freezing" was accomplished "without hearing for an indefinite time. It was also accomplished without service of summons, without notice to me, and without compliance with the jurisdictional provisions of the D.C. Code.

I do not understand that the benefits of the *Sniadach* decision are limited to any particular class of people.

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[5] *Sniadach v. Family Finance Corporation*, 305 U.S. 237, 23 L. Ed.2d 349, 89 S. Ct. 1820.

[6] Brief for Respondents in Opposition, page 5, footnote 2, second paragraph.

Whether they are so limited or not should be made explicit. For that reason, if no other, my petition should be granted.

IV

CONFLICT WITH ANOTHER CIRCUIT.

Mr. Sher also seeks to distinguish the *Baxter* case.[7] This case held such decisions as this appealable. It was denied review by this Court at about the same time as the *Smadach* decision. Sher says[8] that:

> There was no question of compliance with the state attachment law, the District Court taking the position that it was inapplicable.

That may have been the position that the District Court took. But the Circuit Court of Appeals held to the contrary. Mr. Sher in his very next sentence quotes that holding as follows:

> The question that makes this matter reviewable is whether the law permits a trial court to circumvent the Iowa law of attachment altogether. (406 F.2d at 1125)

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[7] *Baxter v. United Forest Products*, 406 F.2d 1120, cert. den. *United Forest Products v. Baxter*, 394 U.S. 1018, 23 L. Ed.2d 349, 89 S. Ct. 1920.

[8] Brief for Respondents in Opposition, page 5, ftn. 2, lines 6-7.

V

OTHER ISSUES

My petition was drafted in careful compliance with Rule 19. It makes four points as to three of which Mr. Sher makes no argument at all. These points also deserve the full consideration of this Court.

CONCLUSION

For the reasons stated in my petition, certiorari should be granted and the Court of Appeals should be required to hear my appeal on its merits.

Respectfully submitted,

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